

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	ID No. 0911004113
)	
JOE WATSON)	
)	
Defendant.)	

Submitted: October 18, 2011
Decided: January 31, 2012

On Defendant's *Pro Se* Motion for Postconviction Relief. DENIED.

ORDER

Eric H. Zubrow, Esquire, Department of Justice, 820 N. French Street,
Wilmington, Delaware 19801.

Joe C. Watson, James T. Vaughn Correctional Center, New Castle, Delaware. *Pro Se* Defendant.

CARPENTER, J.

INTRODUCTION

In 2009, Joe C. Watson was convicted of two counts of attempted robbery in the first degree. Watson timely filed this motion for postconviction relief pursuant to Delaware Superior Court Criminal Rule 61, alleging ineffective assistance of counsel for counsel's failure to move to (1) sever the case; and (2) file a motion for judgment of acquittal. For the reasons discussed below, Watson's motion is DENIED.

BACKGROUND

In 2009 Watson was charged with two counts of attempted robbery in the first degree. The evidence presented at trial established that Watson entered Payless Shoe Store ("Payless") in the University Plaza Shopping Center in Newark, Delaware around 9:00 p.m. on October 29, 2009. At Payless Watson brought a shoebox to the cashier and, as she rang up the purchase, tapped on the box to draw her attention to a note on which "gun" was written. When the cashier responded that she had no money, Watson exited the store.

Payless' neighbor to the right in the shopping center was, at the time, Happy Harry's Pharmacy. Just after 9:00 p.m., Watson entered Happy Harry's and asked the cashier for a pack of cigarettes. While the cashier fetched the cigarettes, he told her to give him the money in the cash register drawer. When the cashier

refused, Watson looked down at his hands—stuffed in the front pocket of his sweatshirt—and said, “Not even with this right here?” Watson then said he was only joking with the cashier and left the store.

The Delaware State Police followed up these incidents by interviewing the cashiers and examining surveillance video from Happy Harry’s. Their investigation led to Watson’s arrest in November of 2009, and Watson was subsequently indicted on two charges of attempted robbery in the first degree. In June of 2010, a Superior Court jury found Watson guilty on both counts.

Watson timely appealed his conviction and the Supreme Court affirmed the Superior Court’s judgment on June 17, 2011. Now Watson, acting *pro se*, applies for postconviction relief pursuant to Superior Court Criminal Rule 61. Watson advances two claims of ineffective assistance of counsel: First, he claims that counsel was ineffective for failing to request severance. Second, Watson claims that counsel was ineffective for failing to move for a judgment of acquittal. The State has replied to Watson’s motion for postconviction relief and Watson’s trial counsel has filed a response affidavit. Because Watson’s motion is not procedurally barred, the Court will consider the merits of his claims.¹

¹ See Super. Ct. Crim. R. 61(i)(1)-(5) (setting forth bars to relief under Rule 61).

DISCUSSION

In order to establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.² A defendant must prove both prongs by a preponderance of the evidence in order to prevail.³ Furthermore, a defendant must present specific, concrete evidence in support of an ineffective assistance claim in order to overcome a “strong presumption” that counsel's representation was professionally reasonable.⁴ As this Court has explained, “[T]here exists a strong presumption that counsel's actions not only fall within a wide range of accepted professional conduct, but are purposeful and strategic, absent evidence to the contrary.”⁵ To show prejudice, a defendant “must set forth and substantiate concrete allegations of actual prejudice.”⁶

² *State v Ross*, 1997 WL 358600, at *3 (Del. Super. May 29, 1997).

³ *Id.*

⁴ *Drummond v. State*, 2008 WL 4989125, at *1 (Del. Nov. 25, 2008) (TABLE).

⁵ *Ross*, 1997 WL 358600, at *3.

⁶ *Drummond*, 2008 WL 4989125, at *1.

1. Ineffective assistance of counsel for failing to motion for severance

Watson first claims that counsel was ineffective for failing to file a motion to sever the two charges of robbery in the first degree. In order for Watson to prevail on this claim Watson must show that, but for counsel's failure to file the motion to sever, the outcome of his trial would have been different.⁷ In short, Watson must show that he could have prevailed on his motion for severance.

Delaware Superior Court Criminal Rule 8 permits joinder of offenses if the offenses are the same or of similar character or are based on the same act or transaction or two or more acts or transactions connected together or constituting parts of a common scheme or plan. It is clear that the robberies in this case were of similar character: they took place at adjoining stores within minutes of each other, and during both robberies Watson gave the cashier the impression that he had a gun. However, even when the rules permit joinder, as they did in this case, Delaware Superior Court Criminal Rule 14 gives the trial court discretion to grant severance if it appears the defendant will be prejudiced by joinder of the offenses.

⁷ See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).

The defendant has the burden of demonstrating such prejudice beyond mere hypothetical arguments.⁸ The defendant may show prejudice by demonstrating that the jury cumulated the evidence of the charged offenses and found guilt when, if the offenses were considered separately, it would not so find.⁹ Watson alleges he was prejudiced by joinder because the State had insufficient evidence to convict him of either robbery and therefore used evidence from each robbery to prove the commission of the other. The insufficient evidence Watson refers to relates to his identification as the perpetrator and two distinct elements of robbery in the first degree: the intention to deprive another of her property and the representation that the defendant possessed a deadly weapon.¹⁰ Watson reasons that the Court would have recognized this prejudice and granted a motion for severance if his attorney had submitted one. The Court disagrees.

a. The State presented sufficient evidence to independently identify Watson as the robber of both stores

Watson alleges that the State based its identification of Watson in each robbery on insufficient evidence, and that if counsel had motioned for severance,

⁸ See *State v. Cooke*, 909 A.2d 596, 599 (Del. Super. 2006) (“The defendant has the burden of demonstrating such prejudice. Mere hypothetical prejudice does not meet this burden.”).

⁹ *Id.* at 605.

¹⁰ See 11 Del. C. § 832 (describing the elements of robbery in the first degree).

the jury would not have been able to identify him as the perpetrator of either crime and the outcome of his trial would have been different.

This argument is without merit. The police report reflects that both cashiers described their robber as a tall, African-American, bearded male wearing a dark hooded sweatshirt and pants. Watson is a tall, African-American male. What is more, both cashiers picked Watson's photograph out of a photo line-up, and both victims identified Watson as the robber in court. This evidence overwhelmingly supports the jury's conclusion that Watson was the robber at both locations.

*b. The State presented sufficient evidence to independently prove
Watson intended to deprive another of her property*

Watson's demand for money from the cashiers was provided as evidence of his intention to deprive another of her property. But Watson's demand for money at Payless was slightly ambiguous: the police report executed on the evening of the robberies didn't note that Watson explicitly asked for money. At trial the cashier testified that Watson told her to open the safe, but on cross-examination she admitted that she did not remember whether she reported Watson's instructions to open the safe when the police first interviewed her.

On the other hand, Watson's demand for money at Happy Harry's was unequivocal: both the police report and the trial testimony reflect that Watson

asked the cashier for all the money in the register. This difference in the strength of the evidence for the same element of two separate charges prompts Watson to now argue that the State used the evidence of the demand for money at Happy Harry's to prove the demand for money at Payless. Yet the record reflects that the State presented sufficient evidence of both robberies independent of each other. Moreover, Watson's counsel effectively represented his client by emphasizing the weakness of the Payless evidence on cross-examination and during closing arguments. The jury, in its role as fact-finder, determined from the evidence that Watson's words and actions at Payless satisfied the elements of robbery in the first degree, and the Court finds that decision was supported by the evidence presented as to that robbery.

*c. The State presented sufficient evidence to independently prove
Watson represented that he possessed a deadly weapon*

Similarly, while Watson more clearly represented that he had a weapon at Payless than at Happy Harry's, the evidence presented at trial was still sufficient for a jury to find a robbery in the first degree at Happy Harry's. At Payless, Watson represented he was armed by pointing to a note with the word "gun" written on it. At Happy Harry's, he represented he was armed by looking down at his hand—concealed in his sweatshirt's front pocket—and saying "Not even with

this?” The robber’s gesture at Happy Harry’s was captured by a surveillance video which the jury considered in addition to the cashier’s testimony and police report. Based on this evidence, a jury could have found—without reference to the evidence related to the Payless robbery—that the cashier subjectively believed Watson was armed and, therefore, that Watson committed robbery in the first degree at Happy Harry’s.

In sum, the State had sufficient evidence to prove Watson’s guilt as to each count of robbery in the first degree. The Court is confident that Watson would have been unable to establish prejudice from these incidents being joined at trial and that, as a result, any motion for severance would have been denied. Therefore, counsel was not ineffective for failing to motion for severance because, even if counsel submitted the motion, the motion would have been denied and the result of Watson’s trial would not have been different.

2. Ineffective assistance of counsel for failing to motion for acquittal

Watson’s second claim is that counsel was ineffective for failing to motion for a judgment of acquittal. On appeal, the Supreme Court noted that there was “more than sufficient evidence” presented at trial to support Watson’s convictions and that it could “find no support whatsoever” for the claim that

Watson is innocent.¹¹ In light of the Supreme Court’s conclusions, this Court cannot find that, but for counsel’s failure to motion for acquittal, Watson’s trial would have had a different outcome.¹² In other words, even if counsel motioned for acquittal, the motion clearly would have been denied. Thus, Watson’s second claim of ineffective assistance of counsel cannot survive *Strickland* and will be denied.¹³

CONCLUSION

A single jury found Watson guilty of two robberies in the first degree. While the State presented stronger evidence of some elements than others with respect to each robbery, this Court—in agreement with the Supreme Court—finds that there was sufficient evidence to establish that Watson committed each robbery and that a motion for severance and a motion for acquittal would have been futile. Thus, Watson cannot satisfy *Strickland* by showing that, but for counsel’s failure to motion for severance or acquittal, his trial would have had a different outcome.

¹¹ *Watson v. State*, 2011 WL 2438769, at *2-3 (Del. June 17, 2011) (TABLE).

¹² *See Pierce v. State*, 2009 WL 189150, at *2 (Del. Jan. 16, 2009) (TABLE) (holding that a motion for acquittal would not have succeeded, and therefore that counsel’s failure to make such a motion did not constitute ineffective assistance, because there was more than sufficient evidence presented at trial to convict the defendant); *State v. Nichols*, 2004 WL 3038024, at *4 (Del. Super. Dec. 27, 2004) (denying defendant’s claim of ineffective assistance of counsel for failure to file a motion for acquittal because the Supreme Court already stated that there was more than sufficient evidence to support defendant’s conviction).

¹³ *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).

For the foregoing reasons, Watson's motion for postconviction relief is hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.